

THE STATE

Versus

KHOLWANI DONGA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi
HWANGE 10 & 16 MARCH 2022

Criminal trial

B. Tshabalala, for the State
G. Muvhiringi, for the accused

DUBE-BANDA J: The accused person appears before this court facing seven counts. In Count 1 he is charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 9th February 2021, accused unlawfully caused the death of Robert Donga (deceased 1) by setting on fire the house in which the deceased was sleeping intending to kill him or realising that there was a real risk or possibility that his conduct may cause his death continued to engage in that conduct despite the risk or possibility.

In Count 2 he is charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 9th February 2021, accused unlawfully caused the death of Praymore Khumalo (deceased 2) by setting on fire the house in which the deceased was sleeping intending to kill him or realising that there was a real risk or possibility that his conduct may cause his death continued to engage in that conduct despite the risk or possibility.

In Count 3 he is charged with the crime of attempted murder as defined in section 189 as read with section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 9th February 2021, accused unlawfully set on fire the house in which Angel Mpala (complainant 1) was sleeping, intending to kill her or realising that there was a real risk or possibility that his conduct may cause her death continued to engage in that conduct despite the risk or possibility.

In Count 4 he is charged with the crime of attempted murder as defined in section 189 as read with section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 9th February 2021, accused unlawfully set on fire the house in which Ayanda Donga (2nd complainant) was sleeping, intending to kill her or realising that there was a real risk or possibility that his conduct may cause her death continued to engage in that conduct despite the risk or possibility.

In Count 5 he is charged with the crime of attempted murder as defined in section 189 as read with section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 9th February 2021, accused unlawfully set on fire the house in which Buhle Hadebe (3rd complainant) was sleeping, intending to kill her or realising that there was a real risk or possibility that his conduct may cause her death continued to engage in that conduct despite the risk or possibility.

In Count 6 he is charged with the crime of attempted murder as defined in section 189 as read with section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 9th February 2021, accused unlawfully set on fire the house in which Bandile Donga (4th complainant) was sleeping, intending to kill her or realising that there was a real risk or possibility that his conduct may cause her death continued to engage in that conduct despite the risk or possibility.

In Count 7 he is charged with the crime of attempted murder as defined in section 189 as read with section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 9th February 2021, accused unlawfully set on fire the house in which Andile Hadebe (5th complainant) was sleeping, intending to kill her or realising that there was a real risk or possibility that his conduct may cause her death continued to engage in that conduct despite the risk or possibility.

The accused person was legally represented throughout the trial. He pleaded not guilty to all the counts and the matter proceeded to trial. The State tendered an Outline of the State Case, which is before court and marked Annexure A. The accused tendered into the record an Outline of his defence case, which is before court and marked Annexure B.

State case

The State produced into evidence two post mortem reports compiled by Dr I. Jekenyia at Mpilo Hospital. The first report relates to deceased 1 (Robert Donga) and is before court marked Exhibit 1. It shows that the cause of death as fatal burns and intentional house burning (petrol). The second report relates to deceased 2 (Praymore Khumalo), and is before court as Exhibit 2. It shows the cause of death as burns and covid 19 infection.

Further the prosecutor produced an affidavit deposed to by one B. Nyabanda a forensic scientist, and it was received in evidence. It is marked Exhibit 3. The scientist opined as follows: that the fire was wilfully and intentionally caused; the physical evidence indicated that an accelerant was used; the accelerant used could not be established; the 5 litres full container had petrol fuel; and there was nothing of forensic value that was obtained from the air dried clothes.

Further the prosecutor produced accused's confirmed warned and cautioned statement, and it was received into evidence. It is Exhibit 4. In the statement the accused says:

I deny the allegations of torching a house were seven people were sleeping, which preferred (*sic*) against me. On the day in question, I retired to bed and did not go outside during the night, moreover did not phone anybody. I woke up the next morning as early as 7 O'clock and went to search for cattle, I met Ayanda Donga who accused me of torching a house which her father Robert Donga was sleeping and threatened that I will die a painful death. I did not answer her.

The prosecutor sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). The admissions related to the evidence of the following certain witness as it is contained in the Summary of the State Case (Annexure A).

The first is the evidence of Buhle Hadebe. Her evidence is that the accused is her uncle. On the 9th February 2021, Ayanda Donga woke her up and told her that there was fire in the sitting room. Ayanda Donga jumped out of the window and this witness followed her. Ayanda Donga assisted deceased 1 to leave the house through the window. Ayanda Donga also assisted Bandile Donga and Andile Hadebe, complainant 6 and 7 respectively to get out

of the house. Deceased 2 escaped from the house through the window and his clothes caught fire which Angel Mpala (complainant 1) put out. Deceased 1, deceased 2 and complainant 1 had severe burns and were referred to hospital. Ayanda Donga reported that she saw accused fleeing from the scene.

The second is the evidence of Phibion Donga. His evidence is that accused is his brother's son. Deceased 1 was his uncle. On the 9th February 2021, at 0200 hours he received a call from Ayanda Donga and she said that the accused had set their house on fire and burnt the family and asked the witness to urgently come. Ayanda Donga said she had seen the accused. This witness proceeded to the homestead and found that deceased 1 and complainant 1 had been taken to hospital. The bedroom was extensively damaged and most of the property inside was burnt.

A report was made to the police leading to the arrest of the accused at a roadblock along the Bulawayo-Victoria Falls road. Accused was driving a red Honda Fit. This witness also saw a 5 litre container with petrol that was picked by Ayanda Donga and handed to the police.

This witness's evidence is that there was a long standing dispute in the family that emanated from a piece of land that deceased 1 gave to his step son Mkhululi Mpala. Deceased 1 was accused of favouring Mkhululi Mpala ahead of his own children with his first wife. Deceased 1 was also accused of causing the death of the accused's father Thabani.

The third is the evidence of Lameck Sibanda. His evidence is that he is a village head. Accused is deceased 1's grandson. Some years ago deceased 1 got married to Angel Mpala (complainant 1). Angela Mpala had an eight year old son, Mkhululi Mpala from her previous relationship. Deceased 1 treated Mkhululi Mpala like his own son. Years later, Thabani Donga (accused's father) got married and deceased 1 allocated him a piece of land to build his own homestead.

In 2008, Mkhululi Mpala got married and deceased 1 allocated him a piece of land to build his own homestead. A dispute arose as to why deceased 1 had allocated him land when he was not from the Donga family. Deceased 1 tried to resolve the dispute. Deceased 1 placed a boundary between Thabani Donga and Mkhululi Mpala's homesteads but Thabani and his wife were against it.

His evidence is further that there was a time when Mkhululi's wife wanted to build a kraal outside her homestead; Mkhululi's wife and Thabani's wife fought over the issue and deceased 1 put a stop to the fight. Mkhululi's wife built the kraal after deceased 1's intervention.

After the fire incident at deceased 1's homestead, deceased 1 called this witness and reported that the accused wanted to kill him. Thabani Donga's wife (Precious Ncube accused's mother) is now using the land that was allocated to Mkhululi without permission.

The fourth is the evidence of Permanent Sibanda. His evidence is that he knows the accused as a local person. On the 9th February 2021, at 0200 hours this witness received a report about this case. He drove to the scene and found that deceased 1, 2 and complainant 1 had severe burns and the roof of the house had collapsed.

Ayanda Donga reported to this witness that she saw the accused fleeing from the scene and she called his name and asked him why he wanted to kill the family. The accused did not respond. The witness observed a spoor of two pairs of show prints and they were not visible enough as it was raining.

This witness ferried deceased 1 and 2 and complainant 1 to hospital. Deceased 1 and 2 had severe burns all over the body. Complainant 1 had burns on the right arm and leg. Ayanda Donga showed the witness a 5 litre container of petrol that she recovered from where she found the accused standing.

The fifth is the evidence of Barnabas Nyabanda. His evidence is that he is a Forensic Scientist based at Criminal Investigations Department, Forensic Science Laboratory. On the 10th February 2021, this witness attended the scene in this case and made certain observations which he noted in his forensic report dated 25 February 2021. The forensic report is before court marked Exhibit 3.

The sixth is the evidence of Dr. Jekenya. His evidence is that he is a registered Medical Practitioner based at Mpilo Hospital. On the 11th February 2021, and on the 30th June 2021, during the course of his duties he examined the remains of the deceased persons and compiled his findings in post mortem report numbers 28/24/2021 and 121/97/ 21 respectively. The reports are before court marked as Exhibit 1 and 2.

The first witness to give oral evidence was Ayanda Donga. This witness testified that on the night of the 8th February 2021, she and the entire family retired to bed. Deceased 1 was her father, deceased 2 a herd-boy in the family, Angel Mpala complainant in count 3 is her mother, and complainants in counts 4, 5, 6 and 7 are children who were in the house on the night of the 8th February 2021. Accused is her half-brother's son. She knows accused very well, and they grew up together. They went to school together. Initially they were staying at the same homestead, until accused and his parents moved to their own homestead.

On the 9th February 2021, at approximately 01:30 am in the morning, she heard a loud sound and the house was on fire. She jumped out of the house through the window. She met accused, who was approximately two metres from her. She was able to see him because there were lights outside and the light provided by the fire. She took some time looking at the accused and they were facing each other. Accused was wearing a black shirt and a navy blue trouser. She screamed calling his name, and asked him what he was doing burning old people in the house. When his name was called, accused ran towards the witness, and he jumped over Buhle Hadebe. He ran out of the gate. She saw her father (deceased 1) crying for help inside the house, she got back to the house and rescued him. She then proceeded to the room where the children were, and took them out of the house through a window. She also removed small things from the burning house. Praymore Khumalo was in the sitting room. He was burnt. When this witness was leaving one bedroom fire fell on her and she got burnt. She called neighbours who then came to her home.

At around 5 O'clock in the morning she started having difficulty in breathing, she then phoned one Permanent Sibanda for help. Sibanda told her to ask two young men to accompany her to the main road i.e. Bulawayo – Victoria Falls road. On the way to the main road she saw accused emerging from the bush. She also saw hidden in a bush a 5 litre container with petrol. She picked the container and took it home. When she returned from taking the 5 litre container petrol home, she met accused, who greeted her. She told the accused that “you burnt the elders and you will not go anywhere.”

After the incident accused did not come to her home to see what happened to the family. Accused's home is approximately seventy metres from the witness's homestead. There was a feud between her father and accused's family.

In cross examination this witness testified that she actually did not see accused spilling petrol into the house, but she could smell petrol where it was spilled. She was asked whether she was assuming that it was accused who spilled petrol into the house, the witness said she was not assuming, it was indeed the accused. This witness testified that when she jumped over the window, she saw accused when he was running towards her.

The witness testified that there was a generator in the sitting room. It was a petrol generator. It was only used once and returned into the box. She excluded the generator as the cause of the fire and said accused put petrol and set the house on fire. She was hurt when her father was burning inside the house, she got back to the house to rescue him and the children. The fire was intense in the room where her father was, then she decided to rescue him first, then the children.

She saw accused person, the two were facing each other. It was put to the witness that the accused does not have a navy blue trousers, the witness said she saw him wearing a navy blue trousers. It was put to this witness that the accused did not set the house on fire as he was at his mother's house at that the time the house caught fire, the witness testified that she saw him and called him by name. She confirmed that she met accused again in the morning, this time she was in the company of Gracious Donga.

The second witness to testify was Angel Mpala. Deceased 1 was her husband, and second deceased was a herd-boy. She is the one who brought up the accused, and called him her child. On the fateful day she retired to bed. When she retired to bed no fire was left burning, and there was no one smoking at the house. When she was fast asleep she felt her arm burning. She woke up her husband. She went to the door, and tried to open the door and failed as the fire in the door area was intense. The fire was burning from the door moving to inside the bedroom. It was intense. Then she heard Ayanda Donga calling accused's name and accusing him of being cruel. She climbed over the bed, opened the window and jumped

out of the house. When she was outside she saw that the fire had engulfed the house. Ayanda Donga got inside the house and removed her father through the window. Ayanda Donga also removed the children and the herd-boy from the burning house. This witness was then taken to hospital.

She testified that indeed there was a generator in the house. It was in the sitting room. The fire did not start from the generator. It started from the veranda of the house and moved to her bedroom.

In cross examination this witness testified that she does not know the time the fire started, all she knows is that it was at night. When this witness heard Ayanda Donga calling the name of the accused, this witness was still inside the house. She said Ayanda Donga was also inside the house. Ayanda Donga had her own bedroom inside the house, when she heard her calling the name of the accused she was inside her bedroom. She did not see accused person that night. Asked by the court she said deceased 2 was sleeping in the sitting room.

The third State witness to testify was Ashford Musekiwa. He is a member of the Zimbabwe Republic Police and the investigating officer in this matter. On the 9th February 2021, he was on standby duties, he and other officers were informed at 4 O'clock in the morning that a house with people inside had been set on fire. When he and other officers arrived at the scene of the crime, deceased 1, deceased 2 and Angel Mpala had already been taken to hospital. They saw prints at the homestead, i.e. a patapata print and tennis shoe print. He got a statement from Ayanda Donga who told him what happened. She told the officer that the house was set on fire by the accused and he was wearing a black shirt and navy blue trouser. She told the officer that she got a container of fuel, i.e. petrol about 800m from the homestead.

This witness and other police officers proceeded to accused's homestead. The accused was not at home. His mother was at home. The mother told them that the accused had gone to the business centre. The police entered the house searching for the accused person. The police saw clothes that matched the description given by Ayanda Donga, as those which were worn by the accused when he was seen at the time the house caught fire. The clothes had just been

washed. Water was still dripping from the clothes. On being questioned by the police the mother said the accused was sleeping in his own bedroom, and on that night he was alone in his bedroom. The police took the clothes for forensic examination.

The police informed their officer in charge at the Station that they could not locate the accused person. After some time the officer in charge told this witness and other police officers that the accused had been arrested at a police road block. He was arrested at the 168 km peg along Bulawayo – Victoria Falls Road. He was arrested about 2km from his homestead.

In cross examination this witness testified that the police were at accused's homestead at around 7 O'clock in the morning. Accused was arrested at 12 O'clock. It was put to this witness that the police went to accused's home after he was arrested, this witness said possible the Criminal Investigations Department took him to his home after arrest, but this witness and his team went to his home in the morning.

Mr. *Muvhiringi* counsel for the accused cross examined Ayanda Donga on two statements she alleged made to the police. The investigating officer was also cross-examined on his statement he made in connection with this case. Counsel merely embarked on such cross examination without asking Ayanda Donga to identify the statements. This court pointed out to counsel that he cannot confront a witness on the basis of a statement allegedly made to the police without first giving the witness an opportunity to identify the statement. Counsel then asked the witness to whether the signatures on the statements were hers, the witness agreed. Thereafter counsel cross-examined the witness on the basis of the two statements made to the police. The investigating officer was also cross examined on the basis of his own statement.

The statements were not handed in as exhibits. It is trite that cross examiner may cross-examine on a document without handing it in as an exhibit. However, if there is cross examination on the content itself, or if it is used to contradict the witness, the document must be handed in. See: Pretorius JP *Cross-Examination in South African Law* (LexisNexis Butterworths 1977) 315. Otherwise there would be no way the court may accept that the version of the witness has changed or that she has contradicted herself. Counsel did not hand

in the statements as exhibits. There is no way this court can assess the alleged contradictions without the statements having been tendered in as exhibits. Just reading excerpts of the statements into the record is inadequate. The court must have the entire document to ascertain whether the excerpts have been correctly read and in proper contexts. Failure to hand in the statements renders the cross-examination valueless. In any event from the excerpts read into the record in we could not discern any contradictions at all. Counsel was just harping on semantics.

At the conclusion of the testimony of the investigating officer the prosecution closed the State case.

Defence case

Accused testified in his defence and called two witness, i.e. his mother and aunt. He testified that on the 9th February 2021, at 01:00 am in the morning he was in his bedroom hut sleeping. He was with his mother, aunt and siblings. He retired to bed at 8 O'clock. He did not get out of the house during the night. He denied having poured petrol and set aside the house in which the deceased persons and complainants were sleeping. He denied having been wearing sandals called patapata, black shirt and navy blue trouser. He said he did not have such clothes as mentioned by Ayanda Donga. On that day he was wearing a green long sleeved shirt, and a faded black trouser. He was wearing these clothes when she met Ayanda Donga at 7 O'clock in the morning.

He got out of the house at 7:30 am in the morning. His mother woke him up and said they must go and look for cattle. After leaving the house he met Gracious and Ayanda Donga. Ayanda Donga said to him he will die a painful way because he burnt her father inside the house.

The police arrested him around 12 noon. He was taken to his homestead around past 2 O'clock to 3 O'clock. When he was arrested he was going to Bulawayo *via* St. Lukes Hospital. Counsel then asked him as to what was his destination, he then testified that some people had hired his brother's motor vehicle to take a baby to St. Lukes Hospital. He was driving his brother's vehicle. He was not trying to escape.

He disputed that when the clothes were taken had just been washed and wet. The police then took a green shirt, another shirt and faded trouser. He did not see the investigating officer amongst the police who dealt with him.

In cross examination he testified that he grew up staying at Robert Donga's homestead. He agreed that he grew up with Ayanda Donga and she knows him very well. He disputed that Ayanda Donga saw her at her homestead at night. He was asleep at that time. He does not know who set the house on fire. It became difficult for him to go and see the burnt house because Ayanda Donga was insulting him. He did not know that the house was burnt, he was told by the police. When he left home to look for cattle in the morning, he returned home around 9 O'clock. When it was put to him that he washed the clothes to remove the smell of smoke, he disputed this suggestion. He denied that when he was arrested he was running away. He knows the burnt house very well because he assisted in building it.

He testified that he sleeps in the same house with her mother and she is the one who keeps the keys to the house. He denied that he was positively identified by Ayanda Donga. He denied that there is a feud between his family and the family of the Robert Donga (deceased 1), the essence of his evidence was that even if there is such he feud he was not part of it.

Precious Ncube testified for the accused. She testified that Robert Donga was her father in law, and her family and her father in law's family were on talking terms. She testified that accused is her son and that on the 9th February 2021, he was asleep in her spare bedroom and there is only one exit door. The house has three rooms. She said on the 8th February 2021, she retired to bed at 11 O'clock in the evening and she slept in the sitting room. Accused retired to bed at 8 O'clock. She said she did not see accused leave the house that night, because he had to pass by the sitting room where she was sleeping. She testified that the accused woke up at around 6 O'clock in the morning. Accused left to look for a cow that was at his aunt's homestead. He returned home very quickly, and when asked the reason she returned without getting to her aunt's place, his answer was he met Ayanda Donga who said she was going to the police to report accused and he will die in prison. Thereafter he took a bath and went to the shops to someone who had been operated on, the person was to be taken to St. Lukes Hospital.

This witness testified that the police arrived at her homestead at approximately 9 O'clock in the morning. The police picked sandals called a patapata belonging to her daughter in law. They said they wanted to compare the prints with the one seen at Robert Donga's Homestead. The police took the patapata only. She disputed the investigating officer's evidence that at that time the police took items of accused's clothing. She said the clothes were taken when the police came to her homestead for the second time in the company of the accused.

In cross examination this witness testified that she was telling the court what happened. She disputed that the police took accused clothes in the morning. She did not see the accused leave the house that night. She said accused could not have left the house after eleven because the door to the spare bedroom where he was sleeping was open, and she was sleeping close to the door and she could have seen him leave. Again she locked the exit door and put the keys under her pillow, so there is no way accused could have left the house without her knowing. She said the window in the room in which accused was sleeping has six panes. This witness testified that accused had his own hut outside the main house, but she asked him to come sleep in the main house because she was afraid after she lost her husband.

The second witness to testify for the accused was Thandiwe Ngwenya. This witness testified that she is related to the accused. On the 19th February 2021, she was at accused's homestead. She was sleeping in the sitting room with accused's mother and the children. She said at around 1 O'clock in the morning the accused was inside the house sleeping. He was sleeping in the spare bedroom. He had retired to bed at around 8 O'clock. He got out of the house at around 6 O'clock in the morning. He was awoken up by his mother to go and look for a cow. She testified that accused could not have been seen at Robert Donga's homestead at 1 O'clock because at that time he was asleep in the spare bedroom. He could not have left the house because his mother locked the house and took the keys. There is only one exit at the house.

She was told by the accused that Robert Donga's house was set on fire. She was told around 6:30 in the morning. Accused was told by Gracious and Ayanda Donga. She conceded that there was a dispute between her family and the family of Robert Donga concerning a field.

This witness testified that the police first came at 9 o'clock in the morning, and again for the second time in the afternoon. In the morning the police took a patapata, and in the afternoon took some clothes. The clothes were taken from accused's bedroom.

In cross examination this witness testified that she did not know that accused had his own room outside the main house. She confirmed that accused was sleeping alone in the spare bedroom. She was not in the same sleeping room with the accused. She said it is not strange that accused's mother would lock the house and put the keys under her pillow.

At the end of the testimony of Thandiwe Ngwenya the defence closed its case.

Analysis of the evidence

We turn to deal with issues that are either common cause or not disputed. We start by making the obvious point that evidence admitted in terms section 314 of the CP & E Act is admitted and accepted for its truthfulness and correctness. This is so because section 314(1) of the CP &E Act provides that:

- (1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact.

The following facts are common cause or not disputed. We know from the undisputed evidence of Lameck Sibanda that there is a serious feud between the accused's family and Robert Donga's (Deceased 1) family. The evidence of Phibion Donga speaks to this serious family feud, and that Robert Donga (deceased 1) was also accused of having caused the death of the accused's father.

It is common cause that a fire broke out at the Robert Donga's (deceased 1) homestead on the 9th February 2021, and engulfed a house which had seven people. Two persons died, and five survived. The fire started at approximately 01:30 am in the morning. According to the evidence Barnabas Nyabanda a Forensic Scientist, the fire started outside the veranda floor going into the spare bedroom and the sitting room simultaneously. This excludes the suggestion that the fire started in the generator which was in the sitting room. Nyabanda opined that the fire was wilfully and intentionally caused, and an accelerant was used to start the fire. However the used accelerant could not be established.

The question to be determined by this court is whether the State has proved beyond a reasonable doubt as required by the law that it is indeed the accused person who set the house on fire. The identification of the accused as the assailant rest entirely on the evidence of Ayanda Donga, who is the sole witness who testified that she saw accused at the scene of crime.

Ayanda Donga is a single witness in respect of the identification of the accused as the assailant. In terms of section 269 of the Criminal Procedure and Evidence Act [Chapter 9:07], an accused may be convicted of any offence, except treason and perjury on the single evidence of any competent and credible witness. The court must be satisfied that the truth has been told. In *S v Mthetwa* 1972 (3) SA 766 (A) the court held that:

Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v Masemang*, 1950 (2) SA 488 (AD); *R. v Dladla and Others*, 1962 (1) SA 307 (AD) at p. 310C; *S. v Mehlape*, 1963 (2) SA 29 (AD).

Ayanda Donga testified that the accused is her half-brother's son. She knows accused very well, and they grew up together. They went to school together. Initially they were staying at the same homestead, until accused and his parents moved to their own homestead. The accused in cross examination conceded that he grew up staying at Robert Donga's (deceased 1) homestead and that he grew up with Ayanda Donga and she knows him very well. Ayanda Donga testified that she has good eyesight. She saw accused who was approximately two metres from her. She was able to see him because there were solar lights outside and the light provided by the fire. She took some time looking at the accused and they were facing each other. Accused was wearing black shirt and a navy blue trouser. She screamed calling his name, and asked him what he was doing burning old people in the

house. When his name was called, accused ran towards the witness, and then ran out of the gate.

When the scene was still mobile Ayanda Donga reported to Buhle Hadebe that she saw accused fleeing from the scene. Ayanda Donga's evidence is that the fire started at 01:30 am at night. The evidence of Phibion Donga on the 9th February 2021, at around 0200 hours he received a call from Ayanda Donga who reported to him that the accused had set their house on fire and burnt the family and asked the witness to urgently come. Ayanda Donga told this witness that she had seen the accused. This was approximately thirty minutes after the fire had started, she was able to name the accused as the culprit.

The evidence of Permanent Sibanda is that on the 9th February 2021, at around 0200 hours he received a report from Ayanda Donga about this case. Ayanda Donga reported to this witness that she saw the accused fleeing from the scene and she called his name and asked him why he wanted to kill the family. The accused did not respond. Again this was approximately thirty minutes after the fire had started, she was able to name the accused as the culprit.

The evidence of Angel Mpala (1st complainant) is that when she was still in her bedroom struggling to escape from the burning house she heard Ayanda Donga calling accused's name and accusing him of being cruel. In cross examination this witness said when Ayanda Donga called accused name she (Ayanda Donga) was inside her bedroom. Our view is that she merely assumed that Ayanda Donga was still inside the bedroom at this point, we say so because Angel Mpala was herself inside her own bedroom, and the door to her bedroom was closed and engulfed by fire. She merely heard Ayanda Donga calling the name of the accused, but did not see her. This shows that she is an honest and truthful witness, speaking to what she saw and heard with any exaggeration. Her evidence was not challenged in material respects in cross-examination and we accept her account of what happened.

Ashford Musekiwa the investigating officer testified that Ayanda Donga who told him what happened. That morning she told the officer that the house was set on fire by the accused and he was wearing a black shirt and navy blue trouser. The officer and other police officers proceeded to accused's homestead. The accused was not at home. His mother was at

home. The mother told the officers that the accused had gone to the business centre. The police saw clothes that matched the description given by Ayanda Donga, as those which were worn by the accused when he was seen at the time the house caught fire. The clothes had just been washed. Water was still dripping from the clothes. The police took the clothes for forensic examination.

The investigating officer was a very good witness. He had a clear recollection of what had taken place. We accept his evidence without qualification.

Accused confirmed that when she met Ayanda Donga in the morning she accused him of having set the house on fire. He confirmed this in his confirmed warned and cautioned statement (Exhibit 4) and oral evidence in this court. Ayanda Donga described clothes which were later found by the police at the accused's homestead. The evidence of Barnabas Nyabanda is that nothing of forensic value was obtained from the air dried clothes. This corroborates the officer's evidence that the clothes were washed. The denial by the accused and her mother that the clothes were washed as testified by the officer is just a falsehood.

Ayanda Donga was consistent right from the time she jumped out through the window that the person she saw was the accused. She was a very good witness, never stating more than she knew or believed. She had a clear recall of events. Her evidence was clear and satisfactory in every material respect. We accept her evidence without reservation.

In his defence outline (Annexure B) accused contends that at the time the crimes were allegedly committed he was sleeping at his mother's house and did not at any time leave the house until around 0700 hours when he went to look for their cattle. He only became aware of the fire incident when he met Ayanda Donga as he was on his way to look for their cattle and Ayanda Donga accused him of torching the house in which they were sleeping. He contends that he was nowhere near Robert Donga's (deceased 1) house.

There is evidence that accused had his own bedroom outside the main house. Precious Ncube, accused's mother said he asked him to use the spare bedroom in the main house after her husband passed away. She was afraid. She testified that on the night in question accused did not leave the house the whole night. She knows this because before she got to bed she locked the only exit door, and put the keys under her pillow. Implying that whosoever wanted

to leave the house should first wake her up. Her evidence is a falsehood. She had another adult in the house in the name of Thandiwe Ngwenya. The contention that accused did not close the door of the spare bedroom where he was sleeping is false, and that Precious Ncube and Thandiwe Ngwenya were able to see him the whole night is just a falsehood. No reason was given why he would keep his bedroom door open the whole night. Again the fact that accused's mother locked the exit door and placed the keys under her pillow is also false. No reason was given for placing the keys under the pillow. This is just false invention calculated to mislead this court.

Accused by his own version was already aware by around 7 O'clock in the morning that he was a suspect in the setting of the house on fire. It is not farfetched to conclude that the washing of clothes which meet the description given by Ayanda Donga to the police was to destroy evidence. That he did not leave his bedroom the whole night cannot be the truth. He was positively identified at the Robert Donga's (deceased 1) homestead on the 9th February 2021, at approximately 01:30 am in the morning.

Ayanda Donga was a very good witness, never stating more than she knew or believed. She was subjected to intense cross-examination, but stuck to her version that she saw the accused person at Deceased 1's homestead at approximately 01:30 at night. I accept her evidence without reservation. Angela Mpala came across as a witness who had a reasonable recall of events. Her evidence was not challenged in any material respects and there is no reason not to accept it. The investigating officer appeared to be a credible and honest witness. We accept his account of what happened without qualification.

We distinctly formed an impression that the accused and his witness were poor witnesses and not telling the truth to this court. They were untruthful, unreliable and untrustworthy witnesses whose evidence cannot be relied on. Their evidence had an artificial ring to it almost as if they had been programmed to say what they was saying. We reject the accused's version as false.

In the circumstances of this case we reject the accused's *alibi* as anchored on a falsehood. The State has proved by evidence that he is the person who started the fire that burnt Robert Donga's (deceased 1) house.

Count 1

We have found it proved that on the 9th February 2021, at approximately 01:30 am at night the deceased was sleeping in his bedroom. The accused used an accelerant to set the house on fire. The fire engulfed the deceased's bedroom. He suffered 80 % superficial burns up to the face. The Pathologist opined that the cause of death was (a) fatal burns and (b) intentional house burning (petrol).

State counsel submitted that this court finds accused guilty of murder in terms of section 47(1) (a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. For this court to return a verdict of murder with actual intent, we must be satisfied that the accused desired death, and that death was his aim and object or death was not his aim and object but in process of setting the house on fire the accused foresaw death as a substantially certain result of that activity and proceeded regardless as to whether death ensues. See: *S v Mugwanda* SC 215/01.

To use an accelerant to set a house on fire (an accelerant is used to speed the development and escalation of fire) at approximately 01:30 a.m. just after midnight. Knowing that they are people inside the house. This is the time of the night that people would be asleep. This is to subdue people in their sleep and at their own house. We must be satisfied that the accused desired death, and that death was his aim and object or death was not his aim and object but in process of setting the house on fire the accused foresaw death as a substantially certain result of that activity and proceeded regardless as to whether death ensues. The post mortem report confirms that the deceased 1 died of serious injuries inflicted upon him by the fire which was caused by the accused. We are satisfied on the evidence before us, that in respect of count 1 the accused is guilty of murder with actual intent.

Count 2

Regarding count 2 the issue to be determined is whether the State has succeeded in proving beyond a reasonable doubt that it is the conduct of the accused that caused the death of the deceased 2. The post mortem report says a deceased died of burns and Covid 19. This court can only convict the accused for murder in respect of the count 2 if the evidence shows

that the injuries sustained by the deceased were caused by the accused, and that those injuries inflicted by the accused caused the death of the deceased. In casu the accused caused the burns and not Covid 19 infection.

The cause of death is therefore inconclusive. What exercised my mind was to whether I should invoke the court's powers in section 280 of the Criminal Procedure and Evidence Act [Chapter 7:09] and order that the doctor be summoned to give oral evidence in this trial. As was observed in G. Feltoe's *Judges' Handbook For Criminal Cases* 1st ed, 2009 Legal Resources Foundation p. 71.

It will be necessary to use the power to ask the doctor to give oral testimony when the original affidavit is inadequate and the court is unable to arrive at a just decision on the basis of this report. If the information is very scanty or vital information is omitted, or the information in the report seems to be contradictory, this power should be exercised. But if it contains all the necessary information there will be no need to summon the doctor. *Anock* 1973 RLR 154 (A); *Sibanda A – 10 – 72* Melrose 1984 (2) ZLR 217 (S).

See: *S v Ndzombane* SC 77/ 2014

I decided not to use the powers to call the doctor to give oral evidence. In the post mortem report it is recorded that deceased 2 suffered *slightly sceptic burns* noted mainly on upper and lower limbs. The Internet Dictionary defines "*slightly*" as to mean to a small degree, not considerably. I also compared the post mortem report for count 1 and count 2, in count 1 the cause of death is said to be *fatal* burns, in count 2 it is just said (a) burns and (b) Covid 19 infection. The word "*fatal*" is not used in relation count 2. It is a notorious fact that Covid 19 infection kills, and as I write this judgment it has caused the death of 6.04 million people worldwide. I take the view that in the circumstances of this case calling the doctor to give oral evidence would not be essential to the just decision of this case. I consider that the State has fallen short of proving beyond reasonable doubt that the deceased 2 died as a result of the actions of the accused. Accused cannot be convicted of murder in relation to count 2, but can be convicted of a competent verdict of murder, i.e. attempted murder.

Counts 3, 4, 5, 6 and 7

The accused set fire on a house that had seven people inside. He used an accelerant to start the fire. He started the fire at approximately 01:30 am at night. That is the time when most people would have fallen asleep. His aim and object was certainly to cause the death of all the people who were inside the house. It was only fortuitous that complainants in count 3, 4, 5 6 and 7 did not die as he had intended.

In the result:

In count 1: Having carefully weighed the evidence adduced as a whole in this trial: the accused is found guilty of murder with actual intent as defined in terms section 47 (1) (a) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Count 2:

Accused is found not guilty of murder and found guilty of crime of attempted murder as defined in section 189 as read with section 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Counts 3,4,5,6 and 7.

The accused is found guilty of crime of attempted murder as defined in section 189 as read with section 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in respect of counts 3, 4, 5, 6 and 7.

Sentence

Mr *Donga*, this court must now decide what sentence is appropriate for the offences for which you have been found guilty. To arrive at the appropriate sentence to be imposed, this court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, factor in the interests of society.

Your personal circumstances have been placed on record, are they are these: you 27 years old. You are not married. You do not have assets of value. You have been in pre-trial custody for a approximating a year.

However, we note that you committed crimes of mindless brutality directed at other human beings. You set on fire a house where seven people were sleeping. You used an accelarant to start the fire, for the purposes of ensuring maximum damage. You started the fire at 01:30 am just after midnight. This is the time when most people have fallen asleep. To ensure maximum casualties.

We find that this murder in count 1 was committed in aggravating circumstances. You caused the death of an old man who was asleep at his home. Your grandfather. It just by luck that the complainants in other counts did not die as a result of the fire you started. In respect of count 2 you were just luck that the post morten report was not conclusive about the cause of death. You committed acts of mindless brutality against other human beings.

You are 27 years, and it is because of this that we have decided against any punishment or term of imprisonment which take permanatly away from the society. We shall leave you with an opening to rejoin the society and contribute to its development. Otherwise you committed serious offences, and the sentences must reflect this phenomenon. What a horrible way of treating other human beings. This court must say it, and say it strongly that such conduct will not be tolerated. Such conduct must be answered with appropriate punishment.

Taking into account the facts of this case we are of the view that the following sentences will meet the justice of this case:

Count 1. Accused is sentenced to 25 years imprisonment.

Count 2. Accused is sentenced to 10 years imprisonment.

Count 3. Accused is sentenced to 10 years imprisonment.

Count 4. Accused is sentenced to 10 years imprisonment.

Count 5. Accused is sentenced to 10 years imprisonment.

Count 6. Accused is sentenced to 10 years imprisonment.

Count 7. Accused is sentenced to 10 years imprisonment.

Total 85 years imprisonment.

It is ordered that sentences in counts 2, 3, 4, 5, 6 and 7 run concurrently. It is further ordered that sentences in counts 2, 3, 4, 5, 6 and 7 to run concurrently with the sentence in count 1. Effective 25 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
Muvhiringi and Associates, accused's legal practitioners*